DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

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MOTION TO DISMISS

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RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado, and GALE A. NORTON, as Attorney General of the State of Colorado,

Defendants.

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The Honorable Roy Romer, as Governor of the State of Colorado, and the Honorable Gale A. Norton, as Attorney General of the State of Colorado, (collectively, "the Defendants") respectfully move for an order dismissing the above action.

## INTRODUCTORY STATEMENT

On November 3, 1992, the people of the State of Colorado voted to approve the addition of a new section 30 to article 2 of the Colorado Constitution. This new provision, known as "Amendment 2", would prohibit the State or any of its agencies or political subdivisions from enacting, adopting, or enforcing any statute, regulation, ordinance, or policy giving preferred status or protections to individuals of homosexual or bisexual orientation.

The Defendants have the responsibility and duty to defend challenges to the Constitution of the State of Colorado. Contrary to Plaintiffs' claims, Amendment 2 on its face neither infringes upon constitutional rights, nor authorizes or encourages discrimination, nor bars suits based on claims of discrimination.

The amendment has only the intent and effect of establishing a statewide policy of governmental neutrality with respect to sexual orientation.

Amendment 2 does not deprive homosexuals or bisexuals of the protections provided all citizens under general principles of civil and criminal law. It simply provides that homosexual or bisexual orientation should not be granted special protection such as the federally-recognized categories of race, gender, religion, and national origin.

Amendment 2 merely prohibits state and local governments from granting special or protected status to homosexuals and bisexuals beyond those provided by federal law. There is no intent, nor any effect, of depriving any individual of either federally-guaranteed civil rights or the federally-guaranteed right to equal protection of the laws.

## BACKGROUND

1. This action was initiated on November 12, 1992.

2. The Defendants have not filed an answer to the complaint. Their answer is not due until December 2, 1992. C.R.C.P. 12(a).

3. Under C.R.C.P. 12(b)(5), the defense of failure to state a claim upon which relief may be granted may be made by motion, prior to the filing of a responsive pleading.

4. None of the constitutional claims of the complaint states a claim upon which relief may be granted. Pursuant to C.R.C.P. 121, § 1-15.1, a separate memorandum brief will be filed in support of this motion within 15 days.

5. Generally speaking, Amendment 2 is not subject to challenge on state constitutional grounds. Being part of the state constitution, it is equal in vitality to other parts of the constitution, and, being later and more specific on this point, it would prevail over any conflicting parts of the constitution.

6. Generally speaking, Amendment 2 is not subject to challenge on federal constitutional grounds, since it leaves intact all rights conferred on individuals of homosexual or bisexual orientation under federal law. These individuals are protected from irrational governmental discrimination based on their sexual orientation.

## STANDING

7. The City and County of Denver, the City of Boulder, the City of Aspen, and the Aspen City Council have failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983, because they are not "persons" possessing federal constitutional rights which they may assert, and thus lack standing to bring this action.

8. The City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen have failed to state a claim upon which declaratory or injunctive relief can be granted under state law, because, as creations of the State, they are wholly subject to the will of the people of the State and therefore lack standing to challenge the validity of the state constitution.

## EQUAL PROTECTION

9. Amendment 2 does not, on its face, violate the equal protection principles of the state and federal constitutions.

10. To the extent that state constitutional equal protection principles might provide greater protections than the federal constitution, they could not do so in this context. Amendment 2 would control in the event of any conflict with other state constitutional provisions.

11. Regarding Plaintiffs' federal claim, the amendment neither affirmatively authorizes, encourages, or establishes discrimination based on perceived sexual orientation, nor bars homosexuals and bisexuals from having discrimination suits adjudicated in state court. Amendment 2 simply limits the grounds upon which relief may be granted in state court to those cognizable under federal law.

12. The refusal of the people of Colorado to extend greater state or local rights to the Plaintiffs does not contravene Plaintiffs' right to vote or otherwise participate in the governmental process. Any claimed discriminatory effect in this, or any other regard, is adequately supported by a number of rational bases, including but not limited to, achieving statewide uniformity on this issue, limiting the provision of special protections to those characteristics upon which there is a national and statewide consensus, protecting the free exercise of religion, and preserving the associational rights of all citizens

from undue governmental interference.

FREEDOMS OF EXPRESSION AND ASSOCIATION

13. Amendment 2 does not, on its face, violate state or federal constitutional rights of freedom of association and expression.

14. To the extent that state constitutional expression/association principles might provide greater protections than the federal constitution, they do not do so in this context. Amendment 2 would control in the event of any conflict with other state constitutional provisions.

15. The First Amendment to the U.S. Constitution does not require legislative bodies be allowed to legislate with respect to every conceivable viewpoint.

16. Amendment 2 does not restrict the ability of anyone to advocate a particular viewpoint or to call for the repeal of the amendment. Individuals continue to be free to espouse whatever viewpoint they desire; Amendment 2 does not coerce anyone to accept or deny a particular viewpoint. All persons continue to enjoy the same right to speak and act according to their beliefs as they did prior to the adoption of the amendment.

17. Amendment 2 does not implicate the freedom of association. The amendment does not limit the ability of persons to associate together to express political or religious views nor does it put any restrictions on any persons to form relationships, deep attachments, and commitments.

ESTABLISHMENT CLAUSE

18. Amendment 2 does not, on its face, violate the Establishment Clauses of the state or federal constitutions.

19. To the extent that state constitutional Establishment Clause principles might provide greater protections than the federal constitution, they could not do so in this context. Amendment 2 would control in the event of any conflict with other state constitutional provisions.

20. The complaint suggests that since the policy expressed by the amendment and some of its supporters may well have reli-

gious antecedents, its passage amounts to a prohibited "establishment of religion." The people neither intended to, nor have in fact established, any religious creed through the adoption of Amendment 2. The complaint does not allege the absence of a legitimate secular basis for the amendment.

VAGUENESS

21. Because Amendment 2 operates only upon governmental entities, the Plaintiffs do not have standing to assert a claim of unconstitutional vagueness.

22. The complaint fails to state a claim, because Amendment 2 is not impermissibly vague in all its possible applications. The amendment's language, considered in light of its legislative history and well-established principles of constitutional construction, readily leads persons of ordinary and common intelligence to understand its scope and meaning.

23. Amendment 2, on its face, is not susceptible of arbitrary application or enforcement.

24. To the extent that state constitutional vagueness principles provide greater protections than the federal constitution, they are inapplicable in this context. Being of equal vitality to the state due process clause, Amendment 2 is subject to attack only on federal constitutional grounds.

PETITION CLAUSE

25. The complaint states no claim under the Petition Clauses of the state or federal constitutions.

26. To the extent that state constitutional Petition Clause principles might provide greater protections than the federal constitution, they could not do so in this context. Amendment 2 would control in the event of any conflict with other state constitutional provisions.

27. The complaint alleges that by denying state or local governmental officials the power to grant legal protections to persons based on their sexual orientation, Amendment 2 abridges their right to petition the government for a redress of grievances. However, the right to petition entails only the right to express one's views to the government. The people, including the

Plaintiffs, continue to enjoy the right to seek the repeal of Amendment 2.

ACCESS TO COURTS/SUPREMACY CLAUSE

28. Amendment 2 does not violate the right of access to the courts, which is an aspect of the right to petition. The amendment does not prevent the assertion of any claim in state court; it simply limits the ability of the state courts to recognize or grant relief predicated upon certain claims. The amendment also does not bar homosexual or bisexual individuals from asserting federally-based discrimination claims in state court.

29. To the extent that state constitutional court access principles provide greater protections than the federal constitution, they are inapplicable in this context. Being of equal vitality to the state due process clause, Amendment 2 is subject to attack only on federal constitutional grounds.

REPUBLICAN FORM OF GOVERNMENT

30. The complaint fails to state a claim for relief on grounds of a denial of the federally-guaranteed right to a republican form of government. For almost a century and a half claims brought under the Guaranty Clause have been held to be nonjusticiable "political questions" to be resolved by Congress and the President. For the same reasons, the Plaintiffs do not have standing to assert a violation of the Enabling Act.

31. Even if the claims are justiciable, Colorado's initiative process does not violate either the Guaranty Clause or the Enabling Act.

LIMITS ON INITIATIVE

32. The complaint fails to state how Amendment 2 exceeds the limits on the initiative power.

33. The Plaintiffs do not have standing to assert a violation of Colo. Const. art. V, § 1(4). Only the Colorado General Assembly, which is not a party to this action, may assert a claim that the amendment deprives it of the power to "enact any measure."

34. Even if Plaintiffs do have standing to assert this claim, the constitutional provision they rely upon affords them no relief. Art. V, § 1(4) simply clarifies that the procedure established in art. V, § 1 does not in and of itself deprive the General Assembly of the power to enact any measure. However, pursuant to art. V, § 1, the people may adopt constitutional amendments which do substantively deprive the General Assembly of the power to enact certain measures. In other words, art. V, § 1 does not prohibit the people from enacting amendments that bind the General Assembly.

35. Moreover, the very language of art. V, § 1(4) limits its application to art. V, § 1. Since Amendment 2 is to be codified as art. II, § 30 it is outside the scope of art. V, § 1.

## HOME RULE AUTHORITY

36. The complaint does not state how the home rule powers of Denver, Boulder, and Aspen have been abridged. Because the issue addressed by Amendment 2 is of statewide, rather than purely local, concern, it is properly addressed via the people's initiative which takes priority over any contrary ordinances, rules, and policies adopted by home rule cities.

## LIMITATIONS ON AMENDMENTS TO STATE CONSTITUTION

37. Amendment 2 does not conflict with the federal constitution, since the amendment leaves the Plaintiffs' federal rights intact. The amendment does not violate the state constitution's home rule provisions since its subject matter is of statewide, not just local, concern. Amendment 2 would also control any inconsistencies between the provisions, as it is later in time and more specific.

## RESERVED POWERS

Plaintiffs' claims are further barred by the Tenth Amendment to the Constitution of the United States.

## RELIEF REQUESTED

WHEREFORE, Defendants respectfully request that this Court dismiss the above-captioned action.

Respectfully submitted this 2nd day of December, 1992.

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within MOTION TO DISMISS upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 2nd day of December 1992, addressed as follows:

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